

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL GANTT and TRINA,	:	CIVIL NO. 1:06-CV-1354
GANTT,	:	
Plaintiffs	:	(Chief Judge Kane)
	:	
v.	:	(Magistrate Judge Smyser)
	:	
ABSOLUTE MACHINE TOOLS, INC.	:	
and ROUNDTOP MACHINERY	:	
INDUSTRIES, CO., LTD.	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

This is a products liability claim brought by Michael and Trina Gantt following Michael Gantt's hand injury which occurred while he was cutting metal parts using a lathe while in the employment of Fulton Precision Industries, McConnellsburg, Fulton County, Pennsylvania. Two corporate defendants are named: Absolute Machine Tools, Inc. ("Absolute"), an Ohio company, and Roundtop Machinery Industries, Co., Ltd. ("Roundtop"), a Taiwan corporation. Diversity of citizenship is the jurisdictional basis. 28 U.S.C. § 1332. The complaint states claims of negligence, claims under strict product liability principles and claims of breaches of warranty by Michael Gantt against each defendant and claims by Trina Gantt, his wife, of loss of consortium against both defendants.

The complaint was filed on July 10, 2006. Defendant Absolute filed an answer on August 11, 2006. A case management

conference was held on September 15, 2006.¹ Defendant Roundtop filed an answer to the complaint on March 14, 2007.

Defendant Absolute filed a motion for summary judgment on July 31, 2007. (Doc. 35). A supporting brief was filed on August 10, 2007. (Doc. 42). An opposing brief was filed by the plaintiffs on August 29, 2007. (Doc. 44). A reply brief was filed on August 31, 2007. (Doc. 45). This Report and Recommendation addresses the motion of defendant Absolute for summary judgment.

Defendant Absolute argues in support of its summary judgment motion that there

. . . exists no genuine issue of material fact tending to establish that Absolute is liable to M. Gantt based upon (1) strict products liability, (2) negligence, and (3) breach of any implied duty of merchantability or fitness for a particular purpose and . . . exists no genuine issue of material fact tending to establish that Absolute is liable to plaintiff T. Gantt for loss of consortium.

(Doc. 42, page 6).

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

¹ A second case management conference, participated in by defendant Roundtop after that foreign corporation had waived service, was held on January 17, 2007 and participated in by both defendants. An Amended Case Management Order was entered on January 17, 2007.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact, though the non-moving party must make a showing sufficient to establish the existence of each element of his case on which he will bear the burden of proof at trial." *Huang v. BP Amoco Corp.*, 271 F.3d 560, 564 (3d Cir. 2001); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

"A factual dispute is material if it bears on an essential element of the plaintiff's claim, and is genuine if a reasonable jury could find in favor of the nonmoving party." *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 580 (3d Cir. 2003). In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988). "Our function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 443 (3d Cir. 2003).

The complaint alleges in material part that the Model ST-60B lathe manufactured by defendant Roundtop and sold to Fulton Precision Industries by defendant Absolute was designed and

intended to be used for precision cutting of metal parts. Michael Gantt was using it for that purpose on July 14, 2005. He was manually guiding a large metal workpiece which was suspended by a crane, into the lathe. He depressed a foot pedal, to close the chuck of the lathe, so as to cause the workpiece to be grasped by the lathe. When the foot pedal was depressed, the lathe's component piece known as its tailstock suddenly and unexpectedly moved toward the workpiece and through Michael Gantt's right hand, causing severe and permanent injuries. The complaint alleges that the defective design of the lathe was one involving its tailstock's movement in response to particular controls. The tailstock fully extended toward the workpiece with one tap of the foot pedal and jogged away in short increments from the workpiece upon each one tap of the foot pedal. The complaint alleges that a non-defective lathe tailstock would work in the opposite manner. It would approach the workpiece in incremental steps and would retract from the workpiece in one step. The complaint alleges that the latter set-up is the ordinary industry practice, and that experienced lathe operators expecting and anticipating the ordinary and customary set-up are vulnerable to injury when operating a lathe having a set-up such as this lathe has. The complaint also alleges other, related theories of product defectiveness and danger in the lathe, including that there is not a hood or guard mechanism on the multiple foot pedal machine to prevent a machine operator from inadvertently activating the wrong foot pedal while operating the

machine and also that there are not appropriate and adequate warnings addressing the tailstock movement.

As stated by the Court in *Pavlik v. Lane Ltd./Tobacco Exporters Intern.*, 135 F.3d 876, 881 (3d Cir. 1998):

The Pennsylvania Supreme Court, whose law we are bound to follow as a court exercising diversity jurisdiction, has adopted § 402A of the Restatement (Second) of Torts, which imposes strict liability on the purveyor of a product in a defective condition "unreasonably dangerous to the user or consumer." See *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Under § 402A, an otherwise properly designed product may still be unreasonably dangerous (and therefore "defective") for strict liability purposes if the product is distributed without sufficient warnings to apprise the ultimate user of the latent dangers in the product. See *Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186, 190 (1997).

To recover under § 402A, a plaintiff must establish: (1) that the product was defective; (2) that the defect was a proximate cause of the plaintiff's injuries; and (3) that the defect causing the injury existed at the time the product left the seller's hands. See *Id.* (citing *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 899 (1975)). In the context of a failure to warn case, to satisfy the second prong, the plaintiff must establish that it was the total lack or insufficiency of a warning that was both a cause-in-fact and the proximate cause of the injuries. See *Greiner v. Volkswagenwerk Aktiengesellschaft*, 540 F.2d 85 (3d Cir.1976); *Conti v. Ford Motor Co.*, 743 F.2d 195, 197 (3d Cir.1984). While the question of causation in Pennsylvania is normally for the jury, "if the relevant facts are not in dispute and the remoteness of the causal connection between the defendant's negligence and the plaintiff's injury clearly appears, the question becomes one of law." *Conti*, 743 F.2d at 197-98 (quoting *Liney v. Chestnut Motors, Inc.*, 421 Pa. 26, 218 A.2d 336, 338 (1996)).

A court applying Rule 56 of the Federal Rules of Civil Procedure must ascertain whether there is a genuine dispute as to material facts. This court has enacted LR 56.1 to structure a party's summary judgment legal and factual theory into a format that permits and facilitates the court's direct and accurate consideration of the motion. However, here the moving party, defendant Absolute, has not filed a LR 56.1 statement of the material facts which (it would submit) are not "in genuine dispute" within the meaning of Rule 56 of the Federal Rules of Civil Procedure. Absolute's motion contains thirty seven numbered paragraphs containing statements of fact and also containing some legal arguments. Assuming *arguendo* that these numbered paragraphs were to be considered to be intended to be a LR 56.1 statement, they do not meet the requirements of LR 56.1 and therefore are not acceptable as a LR 56.1 statement. They are not identified as a LR 56.1 statement, the "statement" is not separate from the motion as LR 56.1 requires and, substantively, these paragraphs do not contain statements of material facts.

A material fact is a fact that is a necessary factual component of the summary judgment theory being advocated by the moving party or that is a necessary factual component of the non-moving party's position that summary judgment should not be granted for the moving party. Rather than stating material facts, the numbered paragraphs in the defendant's motion state

evidentiary facts. They state what witnesses have "stated" or have "acknowledged," what plaintiffs "have submitted," and what a report "states," "concludes" or "suggests." A party moving for summary judgment is contending that, as to a set of material factual matters, there is no genuine dispute. To make that assertion as to a particular material fact, the party must have considered the available evidence and have determined that there is not evidence that supports the opposing party's position on the material factual question. Summary judgment is not appropriate when the moving party and the opposing party both have evidence supporting that party's position as to a material factual issue. To state that a witness has stated a certain fact does not show to the court that the attorney for the moving party has analyzed all of the evidence and has in good faith determined that as to a particular material factual component of the factual theory underlying the moving party's summary judgment theory a sound argument is reasonably made that there is not evidence from which a reasonable jury could draw an inference that is inconsistent with the factual inference embodied in the moving party's statement of the particular material fact being stated. The mere statement of what a particular piece of evidence (i.e., a particular factual assertion of a particular witness) is does not advance the summary judgment analysis. LR 56.1 calls upon counsel to analyze all potentially available summary judgment evidence, to identify relevant inferences of fact that can be drawn from certain items of evidence alone or in combination, to consider the

evidence that may support a materially conflicting inference, and to determine what material statements of fact can reasonably be advanced to the court as being not genuinely in dispute. The absence of an adequate LR 56.1 statement of material facts means that the court must determine the particular underpinnings of a moving party's summary judgment theory without having them presented and therefore invites the court to decide that case on the basis of factual and legal arguments that both sides may not have known were to be presented and considered.

The motion for summary judgment should be denied because the moving party had not filed a LR 56.1 statement of material facts not genuinely in dispute. It is recommended that it be denied on that basis. We will, nevertheless, move on to the merits of the moving party's arguments despite the absence of an adequate LR 56.1 statement. Having considered these arguments and the summary judgment documentary evidence filed by the parties, we conclude that the moving defendant has not shown by its motion that it is entitled to summary judgment as to the plaintiffs' causes of action for injuries caused by a defective product or as to the plaintiffs' other causes of action. It is not shown to be free from genuine dispute that the product was not defective, that it was not a proximate cause of Michael Gantt's injuries, or that the putative defect did not exist in the product when it left the defendant's hands. The plaintiffs' evidence, if accepted by the fact finder can establish that the lathe as it was set up by the

defendant before its sale was defective and that the defect, the uncustomary tailstock quill operating set-up, was the cause of Michael Gantt's injuries.

The plaintiffs' evidence includes the statement of a fellow employee, Kevin Shives, who states in his deposition that

[m]ost quills only come out as long as your foot is on that switch and as soon as you let go of the switch it stops. That particular machine the quill comes out the whole way whenever you step on the switch, the quill being the part of the tailstock that creates the thrust.

(Doc. 44, Exhibit 4).

The plaintiffs' theory of defectiveness in the Johnford Model ST-60B CNC (computer numerical control) lathe manufactured by Roundtop Machinery Industries is stated in detail in the report of David J. Bizzak dated July 11, 2007.

. . . [C]ommon industry practice is to provide a stepped, hold-to-run control for advancing the quill outward (extending the quill.) Such a control scheme is intuitive because the operator mounting a work piece in the lathe may momentarily manually support the tail end of the work piece after the head-end has been placed in the chuck. Then, as the quill is slowly advanced, the operator may make any necessary adjustment to the workpiece to ensure that the tailstock quill contacts the center of the workpiece. In such a mounting scenario, stepped movement of the quill is preferable to single-movement extension of the quill to permit any required repositioning of the workpiece. Additionally, it may be noted that single-movement extension is undesirable because it creates the potential for injury

should any portion of an operator's body be positioned between the quill and workpiece at the time the quill is advanced. In such a situation, single-movement extension of the quill can trap an operator's hand or some other portion of his body between the quill and workpiece.

As opposed to the stepped movement of the quill out control, retraction-or quill in-control is commonly accomplished via either a single depression of the control that results in a single-movement retraction or a hold-to-run control in which the quill retracts at a controlled rate. Because the QUILL IN control is typically actuated after the completion of a machining operation, it is desirable to quickly achieve full retraction of the quill to provide sufficient clearance for the operator to unchuck and remove the finished workpiece from the lathe. It may also be noted that such movement of the quill, even if achieved with a single depression of the control, does not present the potential for trapping of an operator's hand or other body part. Thus, it does not require the precise control of the QUILL OUT function.

The 2001 version of the ANSI B11.6 recognizes the historical and common industry practice of utilizing a hold-to-run control for extension of a power-operated quill. That is, section 6.17.2 states "[a]ny power-operated tailstock quill shall be manually operable by hold-to-run control with a maximum speed of 20 mm/sec (0.8 in/sec)." Contrary to this requirement, as well as common industry practice prior to the issuance of ANSI B11.6-2001, the tailstock QUILL OUT control on the subject Johnford ST-60B CNC lathe utilizes a foot pedal switch in which a single depression results in the extension of the quill to either its full extent of travel or its preset thrust limit.

Regardless of whether any design standards existed to specify the manner in which the tailstock quill control should operate, the designer of any machine must consider the manner in which the operator will interface with the machine to identify potential hazards. In this particular,

instance, trapping of a portion of an operator's body by machine movement has been long recognized as a potential hazard that may lead to serious injury. Consistent with general machine design requirements, a designer has an obligation to identify hazards and address these hazards, in decreasing order of preference, 1) by eliminating the hazard throughout the design, 2) by providing safeguards or guarding to protect operators/users from injury or 3) by warning the user of the hazard and providing appropriate guidance or instructions on means to avoid injury. With respect to the trapping hazard posed by inadvertent movement of the tailstock quill, this hazard could have been readily addressed by using a hold-to-run control scheme to manage QUILL OUT movement. Given the manner in which the tailstock quill is utilized by an operator, as well as the industry practice and norm for tailstock quill control, there is no basis to conclude that hold-to-run switch for control of the QUILL OUT function would have compromised the utility and/or efficiency of the subject lathe.

(Doc. 44, Exhibit 5).

The defendant Absolute argues that the characterization of the one-step tailstock extension operation of this particular lathe as defective is incorrect because the tailstock quill extension operation of the lathe can be set by the company or by the operator to go forth by successive steps (as the other lathes in use at Fulton Precision are set) or can be set as is this lathe to be in one step. "The operation of the quill in this matter [sic] was a matter of customer preference and solely within the control of the customer, Fulton Precision. The timing of the quill could be changed through simple adjustments of the

program.” (Doc. 45, page 2). Absolute supports this position by reference to a copy of the operations manual for the lathe and an expert report. Absolute does not explain, and we have no apparent basis to reliably infer a reason, why the lathe manufacturer would produce machines that incorporate this option, to reliably determine usefulness of the optional non-incremental extending quill, to know the reason for the manufacturer’s default setting or to know the reason for the differing settings of Fulton Precision’s lathes. Defendant Absolute does not demonstrate the absence of any genuine dispute as to any material fact(s) as to whether there was an adequate warning given by Absolute relating to the default quill movement setting(s).

A change in a product’s design from a previous design, when the changed design may create a danger for an unexpected user accustomed to the prior design, may result in a product that is dangerous if adequate warnings of the changed design are not provided.

David J. Bizzak’s report, quoted above, states that the lathe was defectively designed, in that the lathe’s tailstock quill operated with a single-movement extension that was contrary to common industry practice of an operation in a stepped-movement extension. (Doc. 44, Exhibit 5). The plaintiffs theory of product liability is based also in part upon the absence of a warning to the operator to anticipate the different quill

operation. See *Shouey ex rel. Litz v. Duck Head Apparel Co., Inc.* 49 F.Supp.2d 413, 422 (M.D.Pa. 1999).

The defendant asserts that the plaintiffs are advancing an impermissible product liability theory that is based upon a variance from industry standards, which is not a permissible basis to support an inference that a machine is defective. However, the plaintiffs' expert's opinion is not based directly or inherently upon a variance from industry standards, but is based rather principally upon a variance from industry users' expectations, which is a different basis. Product users' expectations are relevant when they are a factor that may be seen to render the product dangerous. Here, moreover, apart from the user's expectation that the advancement of the tailstock quill will be incremental and apart from the increased risk of injury resulting from a user's lack of guardedness against a non-incremental extension, the plaintiffs present the theory that there is inherent danger without incremental extension simply because it provides less control to the user at a time when user control would permit an opportunity to stop the possible encroachment of the tailstock upon a misplaced operator's hand.

The defendant has not shown there not to be a genuine issue of fact as to whether the non-incremental movement of the lathe's tailstock upon the depression of the foot pedal operating that movement is inherently dangerous or as to whether adequate

warnings about that movement in the product were given. Therefore, it is recommended that the defendant's motion for summary judgment as to the product liability claims be denied.

Addressing the negligence claim, Absolute asserts that no genuine issue exists, *inter alia*, as to whether Absolute failed to exercise due care concerning the sale, delivery or installation of the lathe. But, in the light of the critical nature of the difference as between two potential tailstock quill operations, and the possibility that persons accustomed to one form of operations will be endangered without adequate warning of the differing controls in the subject lathe, it can not be correctly said on this record that no reasonable inference can be drawn that here there were not adequate warnings given as to the operations of this lathe.

The defendants has not argued that there is an independent basis for summary judgment in its favor as to the other claims. It is recommended that the motion for summary judgment be denied in its entirety.

/s/ J. Andrew Smyser
J. Andrew Smyser
Magistrate Judge

Dated: September 13, 2007.